

accident the plaintiff was travelling in the middle of the road on his side. From all the evidence that was adduced it is clear that there was no vehicle to the left of the plaintiff and he should have ridden close to the edge of the road. He had no business to be in the middle of the road on his side approaching or at the bend. It was an irresponsible act bearing in mind that he was carrying a pillion rider which made his motorcycle less manoeuvrable and less responsive to evasive action along a bend with a wet road surface. On his own admission the approaching car was not proceeding fast and it seems to me if he had kept close to the left side of the road he was travelling on, the accident could have been avoided. In the circumstances he was equally responsible for the accident and I allowed the appeal on the basis of 50-50 liability. Hearing on the matter of the quantum of damages was adjourned to another date as the parties indicated likely settlement on the amount.

Appeal allowed.

Solicitors: *Jag-Jit Singh & Co; Visva & Co.*

Reported by *PS Ranjan*

Tunku Ismail Bin Tunku Md Jewa & Anor v Tetuan Hisham, Sobri & Kadir

HIGH COURT (PENANG) – ORIGINATING SUMMONS NO
31-280-86
WAN ADNAN J
5 APRIL 1989

Agency – Legal assistant having the conduct of day-to-day business of branch – Whether had ostensible authority to give undertaking – Whether undertaking was of a kind which was in the ordinary course of a solicitor's business

Land Law – Conveyancing – Solicitor's usual undertaking to pay sum and provide guarantee upon registration in favour of transferee and bank – Failure to provide guarantee – Application to enforce undertaking

Legal Profession – Solicitor's undertaking – Conveyance of property – Usual undertaking to pay sum and provide guarantee upon registration in favour of transferee and bank – Failure to provide guarantee – Application to enforce undertaking – Effect and nature of undertaking – Whether court could exercise summary jurisdiction over solicitors – Whether undertaking was clear, unqualified and unequivocal

The plaintiffs as administrators of an estate sold to the purchasers a piece of land for \$1,038,228. The defendants were solicitors acting for purchasers and the bank. On 16 January 1985 the defendants wrote to the plaintiffs' solicitors, undertaking to pay \$450,000 and provide a continuing and irrevocable banker's guarantee for \$435,305.20 upon the plaintiffs' solicitors providing the necessary documents and registration of the

A transfer. The documents were forwarded and the land was duly registered in the purchaser's name on 29 January 1985. The sum of \$450,000 was paid but despite requests the defendants failed to furnish the guarantee.

The plaintiffs alleged breach of the undertaking and applied to enforce it. The defendants denied liability on several grounds; firstly, that the undertaking was ambiguous in that the terms and conditions of the guarantee were not stated; secondly, that the legal assistant who carried on the day-to-day business of the branch of the firm in Alor Setar had no actual or ostensible authority to bind the principals; thirdly, the undertaking was given by mistake in that the legal assistant was mistaken into believing that the bank was going to issue the guarantee; fourthly, that the undertaking became impossible to comply; fifthly, that the undertaking was a matter which should not be dealt with summarily as there were issues which should go for trial.

Held, allowing the plaintiffs' application:

(1) The defendants had wanted to register the memorandum of transfer and charge before paying the full price to the plaintiffs because the bank would not release the loan until the charge was registered. To achieve this, the defendants had to give the necessary usual undertakings which was elementary conveyancing practice under the Torrens system. The plaintiffs' solicitors had in their letter acceded to the defendants' request for the necessary documents and clearly stated that the guarantee was to be made in favour of the plaintiffs and payable upon delivery of vacant possession. Any banker's guarantee would be sufficient. On the facts, the defendants' undertaking was clear, unqualified and unequivocal.

(2) The onus of proving ostensible authority rested with the plaintiffs. There can only be ostensible authority to give an undertaking of a kind which was in the ordinary course of a solicitor's business. It was crystal clear that the undertaking in question was within the ordinary course of a solicitors' business that no further proof is required. The undertaking was necessary for the completion of the documentation and registration of the charge which was undertaken by the defendants as solicitors for the bank.

(3) An undertaking would not be enforced if the court is satisfied that the mistake went further than what a solicitor intended or was aware of. In the present case, the solicitor knew the nature and effect of the undertaking and was merely taking risks in giving the undertaking when the guarantee had not come into his hands.

(4) The undertaking had not become impossible to perform as the guarantee could be obtained from any bank and expressed to be payable upon delivery of vacant possession.

(5) A court could exercise summary jurisdiction over solicitors and it extended so far that if a solicitor gave an undertaking in his capacity as a solicitor, the court may order him to perform his undertaking straightaway. This jurisdiction should however be exercised in a clear case.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-123 of 1989.]

Cases referred to

- 1 *Tan Suan Sim v Chang Fook Shen* [1980] 2 MLJ 66 (refd)
- 2 *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267 (refd)
- 3 *John Fox (a firm) v Bannister King & Rigbys (a firm)* [1987] 1 All ER 737 (refd)

- 4 *City Trust Ltd v Levy* [1988] 1 WLR 1051 (refd)
- 5 *Mullins v Howell* (1879) 11 Ch D 763 (refd)
- 6 *Re A Solicitor* [1966] 3 All ER 52 (refd)
- 7 *Silver & Drake v Baines* [1971] 1 QB 396 (refd)

GS Nijar and Yu Meng Queng for the plaintiffs.
Shahul Amiruddin for the defendants.

Cur Adv Vult B

Wan Adnan J: This is an application by the plaintiffs that the defendants do furnish the plaintiffs a continuing and irrevocable banker's guarantee for the sum of \$435,305.20 payable upon the plaintiffs' delivery of complete vacant possession of the land held under Surat Putus 20740 lot 2414 mukim and district of Kota Setar, Kedah ('the said land') to Kedah Utara Development Sdn Bhd ('the purchasers').

The defendants are a firm of solicitors. Their main office is in Kuala Lumpur. The facts are as follows: The plaintiffs are the administrators of the estate of Tunku Md Jawa Haji Ibni Almarhum Sultan Abdul Hamid (deceased). Pursuant to an order of the High Court Alor Setar the said land was sold to the purchasers for the sum of \$1,038,228. The defendants were acting for the purchasers and Bank Bumiputra Malaysia Bhd and the plaintiffs' solicitors were M/s Tan, Yu & Company.

On 16 January 1985 the defendants wrote to the plaintiffs' solicitors as follows:

We write to inform you that the abovenamed borrower has been granted a banking facility of \$1.1m by way of a first legal charge against the abovementioned property.

We would be most grateful if you could forward to us the duly adjudicated memorandum of transfer together with the title deed and other necessary documents on our undertaking to pay you the sum of \$450,000 towards account of the tender amount and a continuing and irrevocable banker's guarantee for \$435, 305.20 upon the due registration of the said transfer.

On 28 January 1985 the plaintiffs' solicitors wrote to the defendants as follows:

We thank you for your letter dated 16 January 1985. We enclose herewith the following documents:

- 1 original title deed to the above land;
- 2 original memorandum of transfer duly stamped in favour of Kedah Utara Enterprise Sdn Bhd (now known as Kedah Utara Development Sdn Bhd);
- 3 notice of withdrawal of caveat in duplicate duly signed by Kedah Utara Development Sdn Bhd;

Please note that the aforesaid documents are delivered to you on your express solicitors' undertaking to present the said transfer and title deed for registration within seven (7) days upon receipt of the said documents and to forward us the following within seven (7) days upon the due registration of the said transfer in favour of Kedah Utara Development Sdn Bhd:

- (a) the sum of \$450,000 towards account of the tender amount; and

- A (b) a continuing and irrevocable banker's guarantee for a sum of \$435,305.20 being the full and final balance of the tender amount, made out in favour of Tunku Ismail bin Tunku Md Jawa and Tunku Arfah bt Tunku Mohd Jawa, as the administrators of the estate of Tunku Mohd Jawa, deceased, ('the vendors') and payable upon the vendors' delivery of complete vacant possession of all that piece of land known and described as Surat Putus 20740, lot 2414, mukim and district of Kota Setar, Kedah to the purchaser Kedah Utara Development Sdn Bhd and upon confirmation of the same by the said solicitors M/s Tan, Yu & Company.

- C The said land was duly registered in the name of the purchasers on 29 January 1985. The charge over the said land in favour of Bank Bumiputra Malaysia Bhd was also duly registered. On 28 January 1985 the defendants forwarded to the plaintiffs' solicitors a demand draft for \$450,000 being part payment of the balance of the purchase price. But despite many requests they had failed to
- D furnish the continuing and irrevocable banker's guarantee for \$435,305.20. The plaintiffs alleged breach of undertaking on the part of the defendants and by this application seek to enforce the undertaking.

- E The affidavits filed on behalf of the defendants were made by Haji Ahmad Sobri bin Haji Ahmad Tajuddin who described himself as a senior partner of the firm of M/s Hisham Sobri & Kadir at all material times. According to him, with the consent of the other partners of the firm, a branch of the firm was opened in Alor Setar. The persons entitled to the earnings from the branch were only himself and Dato' Hishamuddin. At all material
- F times the branch was managed by Yaacob bin Othman, a legal assistant in the employ of the branch. Yaacob resigned with effect from 28 February 1985 and with effect from 1 March 1985 the branch was sold to Wan Aziz bin Wan Daud with all its assets and liabilities. The defendants deny liability on the following grounds:

- G 1 The undertaking was ambiguous.
- 2 The legal assistant Yaacob bin Othman did not have authority.
- 3 The undertaking was given by mistake and therefore not enforceable.
- H 4 The undertaking has become impossible to comply.
- 5 This matter is not a fit and proper case for summary enforcement.

The undertaking was ambiguous

- I Counsel for the defendants had submitted that the undertaking was ambiguous for the reason that it did not state the terms of the guarantee to be issued, the name of the issuing bank, the person in whose favour the guarantee was to be issued and the time the guarantee would crystallize. In my view there is no ambiguity at all. The defendants had wanted to register the memorandum of transfer and charge first before paying the full purchase

price to the plaintiffs because the bank would not release the loan until a charge in their favour had been registered. To achieve this the defendants had to give the necessary usual undertaking for the payment of the balance of the purchase price. 'All this is elementary conveyancing practice under the Torrens system': per Chang Min Tat FJ in *Tan Suan Sim v Chang Fook Shen*.¹ The undertaking was to pay \$450,000 and to give a continuing and irrevocable banker's guarantee of \$435,305.20 upon due registration of the transfer. The plaintiffs' solicitors in their letter dated 28 January 1985 in acceding to the defendants' request for the duly adjudicated memorandum of transfer and other necessary documents had clearly stated that the continuing and irrevocable banker's guarantee was to be made out in favour of the plaintiffs and that it should be made payable upon delivery of vacant possession of the said land to the purchasers. It is not necessary that the banker's guarantee must be issued by a particular bank. Any banker's guarantee from any bank would be sufficient for the purpose.

The defendants knew the nature and effect of their undertaking and knew exactly what was required of them thereunder. On the facts I find that the defendants' undertaking was clear, unqualified and unequivocal. The defendants had made a clear undertaking. (See *T Damodaran v Choe Kuan Him*² and *John Fox (a firm) v Bannister King & Rigbys (a firm)*.³)

The defendants' legal assistant Yaacob bin Othman did not have authority

Counsel for the defendants had submitted that there was no evidence that Yaacob had authority to give the undertaking. He said the plaintiffs must prove that Yaacob had the ostensible authority. In *City Trust Ltd v Levy (United Bank of Kuwait Ltd v Hammoud and Others; City Trust Ltd & Anor v Levy)*⁴ one Emmanuel was engaged as an assistant solicitor and he had the charge of the day-to-day running of a branch office under the supervision of the principal. He gave an undertaking. The issue before the court was whether the undertaking was binding upon his principal. Consequently it was in issue whether he did have ostensible authority since he did not have actual authority. It was said in that case that the onus of proving ostensible authority is on the plaintiff. The court also accepted the proposition that there can only be ostensible authority to give an undertaking of a kind which is in the ordinary course of a solicitor's business. In that case expert evidence was brought in to show that the undertaking given by Emmanuel was within the ordinary course of a solicitor's business. There was a need for such evidence. The undertaking was in the following form:

Please accept this letter as an irrevocable and unconditional undertaking to pay to you on or before two months from date hereof for the credit to the account of AE Johnson the sum of one hundred and fifty thousand pounds (£150,000).

A The bank relied on it in granting the loan to Johnson.

Here in the present case it is so crystal clear that the undertaking was within the ordinary course of a solicitor's business that no further proof is required. The defendants were acting for the purchasers and the bank. The purchasers were getting a loan from the bank to pay the balance of the purchase price. The bank would only release the loan upon registration of the charge in their favour. The memorandum of transfer would have to be registered first. An undertaking to the plaintiffs for the payment of the balance of the purchase price was thus necessary for the completion of the documentation and registration of the charge which was being undertaken by the defendants as solicitors for the bank. What further proof is necessary? The affidavit evidence had satisfied me that the undertaking given by Yaacob to the plaintiffs' solicitors was within the ordinary course of a solicitor's business. He therefore had the authority to give the same.

The undertaking was given by mistake

Counsel for the defendants submitted that as Yaacob was mistaken into believing that the bank was going to issue the guarantee, the undertaking was unenforceable. I was referred to the case of *Mullins v Howell*.⁵ In that case the court refused to enforce an undertaking against the defendant because the court was satisfied that the defendant had made a mistake. The mistake was that 'the undertaking went further than he intended or was aware of, inasmuch as he never intended to remove the projecting buttresses ...' The mistake was as to the extent of the undertaking. But here in the present case there was no such mistake. Yaacob knew exactly the nature and effect of the undertaking he gave. There was no mistake as to the undertaking. Yaacob was just taking risks in giving the undertaking when the necessary banker's guarantee had not yet come to his hands.

The undertaking has become impossible to comply

In *Re A Solicitor*⁶ the court held that the court would not order a solicitor to do something which was not possible for him to carry out. In that case Pennycuik J said:

... on the evidence before me the lease is not to be found and I do not think it would be right to make an order on the respondent solicitor to hand it over to the bank. There is the further point that the lease itself has been forfeited so that the interest which is the subject matter of the lease no longer exists. (See also *Udall v Capri Lighting Ltd* [1987] 3 WLR 465.

I In the present case the defendants' undertaking was to give a banker's guarantee for the balance of the purchase price. This was necessary because at the relevant time vacant possession could not be given to the purchasers by reason of there being squatters on the said land. That was why the guarantee was to be made payable only upon the

delivery of complete vacant possession of the said land. Now vacant possession had already been given to the purchasers and according to Haji Ahmad Sobri in his affidavit the purchasers had started to build houses on the said land. The plaintiffs are yet to receive the balance of the purchase price of \$435,305.20.

The undertaking has not become impossible of performance. The defendants can obtain the banker's guarantee from any bank. It can still be expressed to be payable upon delivery of vacant possession of the said land, but since vacant possession had already been given the guarantee can be crystallized forthwith.

The matter is not a fit and proper case for summary enforcement

In *Silver & Drake v Baines*⁷ Lord Denning MR said:

This court has from time immemorial exercised a summary jurisdiction over solicitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally but it is the fault of his clerk, he is accountable for it. This jurisdiction extends so far that if a solicitor gives an undertaking in his capacity as a solicitor the court may order him straightaway to perform his undertaking. It need not be an undertaking to the court. Nor need it be given in connection with legal proceedings. It may be a simple undertaking to pay money, provided always it is given 'in his capacity as a solicitor'. If such an undertaking is given, the court may summarily make an order on the solicitor to fulfil his undertaking ... This summary jurisdiction means, however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings; no discovery; and no oral evidence, save by leave. The jurisdiction should, therefore, only be exercised in a clear case.

Counsel for the defendants had submitted that the matter ought not be dealt with summarily as there are issues which should go for trial. Apart from the issues which I have already dealt with there was the issue that the Alor Setar branch of the defendant firm was a separate entity and that the branch office had been sold to others. In my view the sale of the branch office did not affect the liability of the defendants. The liability had already incurred and the defendants would continue to be liable to the plaintiffs despite the sale. The private arrangement among the partners of the defendant firm as to their respective interests in the firm and in the branch also does not affect the liability of the defendants on the undertaking. It is for the partners themselves to determine who among them should bear the liability. It is not for the court to determine the issue on this application to enforce the undertaking.

It is my finding that this is an appropriate case for which summary jurisdiction can be exercised. I have already held that the defendants' undertaking was clear, unqualified and unequivocal, that it was clearly within

A the ordinary course of a solicitor's business and that Yaacob had the ostensible authority to give the undertaking. On the evidence before me I am satisfied that the case against the defendants had been clearly established (see *John Fox v Bannister King & Rigbeys*³).

B For the above reasons I allowed the plaintiffs' application in terms of the originating summons and costs. *Application allowed.*

Solicitors: *Nijar and Nijar; Tan, Yu & Co; Sri Ram Zulkifly & Kumar.*

C

Reported by *Yap Shao Sin*

D **Toh Seak Keng v Lim Huang Cheow & Ors** (Toh Seow Ngan & Ors, Interveners)

Toh Seow Ngan & Ors v Toh Seak Keng & Ors

E HIGH COURT (KUALA LUMPUR) – ORIGINATING PETITION
NO C2 OF 1982 & SUIT NO C4-22-295-86
VC GEORGE J
1 APRIL 1989

Civil Procedure – Consent order – Order affecting strangers to action – Proceedings to set aside consent order unsuccessfully brought by party – Strangers to action supporting such proceedings – Strangers commencing separate action to set aside consent order – Whether estopped by their conduct in previous proceedings

G One Toh Seak Keng, a director of a company, brought Originating Petition No C2/82 pursuant to s 181 of the Companies Act 1965 against some of his fellow directors who were the first, second and third respondents and seeking, inter alia, an order that those respondents purchase his shares in the company. The petitioner was absent at the hearing of the petition but his counsel was present. Counsel for the petitioner and counsel for the respondents recorded a consent order before the judge by the terms of which the first and second respondents were ordered to purchase 390,000 shares in the company registered in the name of the petitioner and in the names of various members of his family at the price of \$1.90 per share. Of the shares, only 140,000 were registered in the name of the petitioner. The rest of the shares were held in lots of 50,000 in the name of each of five different members of his family.

H The petitioner later applied for an order, inter alia, that the consent order be set aside, alleging that he had never instructed counsel to consent to the sale of the shares. He also said that the consent order affected not only him but members of his family in respect of their own shareholdings in respect of which they had not given instructions and further that they were not parties to the petition. The application was dismissed apparently, inter alia, because the order had already been perfected when the application came on for hearing and accordingly could not be set aside at the instance of only one of the parties. The petitioner did not appeal against the decision but commenced